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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 337.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *Appellant*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

Appeal from the United States District Court for the District of Columbia.

PETITION FOR REHEARING.

DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.

HENRY B. CURTIS,
HARRY McCALL,
HENRY L. WALKER,
W. S. MACGILL,
Attorneys for Railroad Intervenors.

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Come now the appellees Interstate Commerce Commission and the Railroad Intervenors, the City of New Orleans, Louisiana, the Chicago, St. Louis and New Orleans Railroad Company, the Gulf, Mobile and Ohio Railroad Company, the Illinois Central Railroad Company, the Louisiana and Arkansas Railway Company, the Louisville and Nashville Railroad Company, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, New Orleans and Northeastern Railroad Company, New Orleans Terminal Company, Texas and New Orleans Railroad

Company, The Texas and Pacific Railway Company, and Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans, and present this, their petition for a rehearing of the above entitled cause, and, in support thereof respectfully show:

The full Court should be given an opportunity to examine the record in this case and determine the meaning of Section 5(2)(f) of the Interstate Commerce Act, since the seven Justices participating at the first hearing have sharply divided on the question of whether resort to the legislative history is warranted to determine the intent of Congress in the face of the specific and clear language used, and especially when the controlling opinion of only four members of the Court (three Justices dissenting) overlooks important and convincing parts of the legislative history which show that Congress intended to specify a fixed and definite period of time for the duration of the fair and equitable arrangement contemplated in the case of railroad consolidations.

1. THE COURT IN-ITS FOUR TO THREE DECISION HAS DEPARTED FROM THE WELL-SETTLED DOCTRINE THAT LEGISLATIVE HISTORY WILL NOT BE RESORTED TO WHEN THE LANGUAGE OF A STATUTE IS CLEAR AND UNAMBIGUOUS; THE FULL COURT SHOULD THEREFORE REHEAR THE CASE AND DECIDE IF THE CONTROLLING OPINION OF THE MINORITY OF THE FULL COURT IS CORRECT.

The position of the Interstate Commerce Commission and the Intervening Railroads[1] is that the plain language

[1] The answer of the United States, the oral argument and the brief in the Court below on behalf of the United States are also in full accord with and in support of the order of the Interstate Commerce Commission (See R. Bf. 1-6). The controlling opinion of this Court, however, gives consideration to the Department of Justice's brief filed here which is at variance with the answer of the United States (R. 53), and contrary to its position below.

of Section 5(2)(f) of the Interstate Commerce Act is clear and unambiguous and can be interpreted only to mean that the Commission must prescribe a fair and equitable arrangement measured by the specification therein of a protective period of four years from the effective date of the order of approval of a transaction within the scope of the statute (I. C. C. Bf. 18-32; Bf. 5-12).[2] This interpretation of the statute was followed by the Commission in the first case which arose shortly after the passage of the statute, and has been consistently followed for a period of almost ten years (I. C. C. Bf. 42-44). The statute was succinctly analyzed and clearly explained in accord with this position in the unanimous opinion of the three-judge district court below as follows:

> "In our view the language of the statute in question is clear and unambiguous and the Commission's interpretation is correct. The first sentence thereof provides that the Commission shall require fair and equitable arrangements to protect the interests of employees affected. The second sentence prescribes the standard for such arrangements, namely that they shall be such that the employees will not be placed in a worse position with respect to their employment, and then proceeds to limit the time of such protection, namely four years from the effective date of the approval order. In addition, this interpretation is in accordance with the Commission's prior construction of the statute, and on that account is entitled to great weight. Finally, the legislative history set forth by counsel for the defendants in their briefs is corroborative of the Commission's interpretation of the statute." (R. 71-2)

[2] The following abbreviations are used for convenience throughout this petition:

Bf.—Main brief of Railroad Intervenors
R. Bf.—Reply brief of Railroad Intervenors
I. C. C. Bf.—Brief of Interstate Commerce Commission
D. J. Bf.—Brief of Department of Justice
App. Bf.—Brief of Appellant
R.—Transcript of Record

In the controlling opinion of March 27, 1950, this Court did not find any ambiguity in the language of the statute, but nevertheless proceeded to examine fragments of the legislative history as a basis for reading into the statute by interpretation a meaning not expressed by the plain words used by Congress. This approach led the Court into a result that has the effect of encroaching on the legislative powers of Congress, which the Court has always heretofore carefully avoided and recently stated was improper in the case of *Federal Power Commission* v. *East Ohio Gas Company*, 338 U. S. 464, 474, as follows:

> "We find no language in the Act indicating that Congress meant to create an exception for every company transporting interstate gas in only one state. Regardless of whether it might have been wiser and more farseeing statesmanship for Congress to have made such an exception, we should not do so through the interpretative process. There is nothing in the legislative history which authorizes us to interpret away the plain congressional mandate."

Mr. Justice Jackson in dissenting recognized that the instant case was not a proper one for resort to the legislative history to vary the terms of the statute, as also did Mr. Justice Frankfurter and Mr. Justice Reed, who, in a dissenting opinion, quoted with approval the strong and forceful language used by the Government in the court below in support of the Interstate Commerce Commission, as follows:

> "The section contains the clear and precise provision that the four-year period shall commence from the effective date of the order of approval. Had Congress intended that the period shall run from the date when the consolidation goes into effect or, as argued by plaintiff, from the date the employees are adversely affected, such words easily could and would have been used by Congress. Nor does the section give to the Commission discretion in applying a period other than four years from the effective date of the order of approval. The terminology in the statute is that the

Commission *shall* include the four-year limitation therein provided. To provide a different period in the Commission's order would be contrary to the specific requirement imposed upon the Commission by the statute.

* * * * * * * * *

"Congress deliberately fixed the period of protection to start from the effective date of the order and not the date an employee is adversely affected.

* * * * * * * * *

"In the light of the clear unambiguous and specific language of Section 5(2)(f), its consistent interpretation and application by the Commission, since its enactment and over a long period of years, and the legislative history of the statute, the order of the Commission herein should not be disturbed."

As the Court has by the first opinion in this case inadvertently erred in resorting to the legislative history, and by the resulting decision of a minority of the full Court encroached on the functions of Congress, it is submitted that the two members of the Court who were absent at the argument and did not participate in the decision should have the opportunity to join with the Court in rehearing this case so that the opinion and decision may be corrected and a decision be rendered by a clear majority of the full Court.

2. THE CONTROLLING OPINION OF ONLY FOUR MEMBERS OF THE COURT OVERLOOKS IMPORTANT AND CONVINCING PARTS OF THE LEGISLATIVE HISTORY WHICH SUPPORT THE JUDGMENT OF THE LOWER COURT AND SHOW CONVINCINGLY THAT THE COMMISSION'S INTERPRETATION OF THE STATUTE IS IN ACCORD WITH CONGRESSIONAL INTENT.

Although it is unnecessary, in our opinion, to resort to the legislative history in view of the plain and unambiguous language of the statute, the legislative history is reviewed in the Railroad Intervenors' brief (Bf. 13-22) for the purpose of showing that it corroborates the plain meaning of the statute and the interpretation reached by the

Commission and the court below. See *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269, 278. Likewise, the brief of the United States filed in the court below the Commission's brief (I. C. C. Bf. 32-42) show that the compromise reached by the second conference committee was for the very purpose of fixing a definite mandatory protective period for the duration of the fair and equitable arrangement to be prescribed by the Commission pursuant to Section 5(2)(f).

The controlling opinion, however, contents itself with a review of the background leading up to the legislation which merely shows that the Congress desired to make some sort of mandatory requirement for the protection of the employees to be adversely affected in the case of railroad consolidations. As the opinion shows, there was a disagreement between the Senate and the House over the duration of the required arrangement. The Senate would have left the period of protection entirely up to the discretion of the Commission, while the House would have required complete protection against any adverse affect for an unlimited time. The opinion then points out that the House version was recognized as being impracticable as it would have prevented all consolidations. (See in this connection the Commission's recommendation against the House version (App. Bf. 40), as well as the objections of Chairman Lea describing the House version as fantastic (86 Cong. Rec. App. 2865, I. C. C. Bf. 33).) The opinion concludes its consideration of the legislative history by merely stating that the second conference committee reported Section 5(2)(f) in the final form in which it was enacted into law. Instead of examining the committee report and the legislative debates thereon to determine the meaning of the statute, the opinion proceeds to make an interpretation of the statute only in the light of the background down to the beginning of the debates, thus overlooking the vital and most important part of the history which, for the first time, revealed the final, considered intent and purpose of the conference committee and the Congress.

This vital part of the legislative history is discussed in the briefs in considerable detail (Bf. 17-22, I. C. C. Bf. 37-42), and by overlooking it the Court has inadvertently failed to give full consideration to the position of the Commission and the Railroad Intervenors. Indeed, it is not without significance that the Court also overlooked the fact that the Department of Justice has admitted that there "may be some room for conflicting interpretations of the debate," (D. J. Bf. 18).

Representative Lea, Chairman in charge, in discussing the Second Conference Report, made it abundantly clear that the statute was to be read as a whole and that the four year period was prescribed for the purpose of definitely fixing the duration of the protective arrangement (Bf. 17-19). In the debate that followed, Chairman Lea and Representative Wolverton, also a member of the conference committee, in response to questions, reiterated that the fundamental purpose of the statute was to give employees "protection against sudden and long unemployment" by specifically fixing the time for the running of the benefits from the effective date of the Commission's order rather than some other date (Bf. 18-19). Finally, the controlling opinion of the Court completely overlooks the fact that one of the most active proponents of this legislation, President A. F. Whitney of the Brotherhood of Railroad Trainmen, agreed in his report on the legislation, quoted in part at page 20 of the Railroad Intervenors' brief, that the first two sentences of the statute should be read together as providing one protective arrangement limited to a four year period beginning with the effective date of the Commission's order.

In connection with the legislative history it is also to be noted that the controlling opinion indicates that discrimination would result if the Commission is prohibited from applying its full discretion to employees displaced by consolidations, at the same time it is authorized to apply its full discretion to those displaced by abandonments (See

note 16 of the opinion). But Congress specifically rejected an attempt to extend Section 5(2)(f) to abandonment cases under Section 1 (18) to (20) of the Interstate Commerce Act, as pointed out in the opinion at page 10; and, as a matter of fact, the Commission has never prescribed, since the passage of Section 5(2)(f), a protective arrangement extending beyond a period of four years from the effective date of an order entered pursuant to Section 1 (18) to (20), and in many such cases has required no protection whatsoever.[3] Moreover, there is nothing in the record or the briefs to show any discrimination resulting in the case of such employees, if any, who might be affected by the abandonments involved in the New Orleans transaction as compared with those who will be affected by the consolidation features. On the contrary, as shown in the Railroad Intervenors' brief (Bf. 22-28), discrimination would necessarily follow if the Commission had adopted the interpretations sought by the appellant.

In the light of all these circumstances, it is submitted that the full Court should review the legislative history again, if it be determined that the legislative history is pertinent in this case, in order to give full consideration to all of its aspects, and particularly those parts showing the intent of Congress in adopting the language recommended by the Second Conference Committee.

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[3] In a few cases prior to 1940, the Commission did prescribe conditions comparable to the Washington Job Protection Agreement, which agreement provided for benefits limited to 60% of prior earnings for periods varying from 6 months to 5 years depending upon the length of prior service of the employees. The maximum benefit under this provision—60% for 5 years—was equivalent to 3 years at full earnings. Since 1940, the Commission has customarily prescribed a maximum of 4 years at full earnings. See in this connection *United States* v. *Lowden*, 308 U. S. 225, and *I. C. C.* v. *Railway Labor Executives' Assn.*, 315 U. S. 373, and the discussion in the Commission's brief at pages 23 to 32.

CONCLUSION.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the District Court be, upon further consideration, affirmed.

Respectfully submitted,

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Attorneys for Railroad Intervenors.

CERTIFICATE OF COUNSEL.

We, Daniel W. Knowlton, Chief Counsel of the Interstate Commerce Commission, and W. S. Macgill, counsel for the above-named Railroad Intervenors, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.

W. S. MACGILL,
Counsel for Railroad Intervenors.